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NO. 87-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE MEMORANDUM SUGGESTING THAT THE CASE IS NOT MOOT

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The *amicus curiae,* John B. Holmes, Jr., District Attorney of Harris County, Texas, files this memorandum to advise the Court of certain facts which, while potentially dispositive of the particular case pending, do not render this cause moot since the present controversy is "capable of repetition yet evading review."

At midnight on July 20, 1987, the Second Special Session of the 70th Texas Legislature ended. Thirty days later, on August 19, 1987, any right to a legislative continuance by Robert Jack Collier or his hired attorney, Representative Debra Danburg, expired automatically under the terms of the pertinent statute. Tex. Civ. Prac. & Remedies Code Ann. § 30.003 (Vernon 1986). Once Collier's claim to a legislative continuance expired, the conditional issuance of a writ of mandamus by the Texas Court of Criminal Appeals in *Collier v. Poe,* also expired. Thus, the Honorable Ted Poe, Judge of the 228th District Court of Harris County, Texas, is not presently subject to being mandamused in this case. The aggravated assault charges against Collier have been transferred to the 263rd District Court in Harris County and are set for disposition on September 25, 1987.

One might then conclude that the case now pending on appeal before this Court, *Collier v. Poe,* No. 87-141, is rendered moot. It is not.

As a practical matter, the present case cannot be moot until Robert Jack Collier has been tried. Under the Texas Constitution, the Governor may call a special session of the Legislature at any time. Tex. Const. Art. III, section 5, Interpretive Commentary ("Since regular legislative sessions are somewhat infrequent, there *often* arises a necessity for summoning special sessions in order to provide for urgent matters.") (emphasis added). Thus, if Governor Clements calls another special session of the legislature in the near future, a writ of mandamus could still issue in this case. The threat of renewed legal action will prevent mootness. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.,* 457 U.S. 702,

704 (1982) (although particular work stoppage no longer in effect, union might resume such at any time; therefore collective bargaining agreement dispute not moot).

Conceivably, the State could prolong the present case by seeking a continuance to maintain a "live" lawsuit in this Court. It would be the height of hypocrisy, however, for the State to delay this or any future trial merely to maintain a "case and controversy" for purposes of judicial review. This is especially true when the basic issue being litigated is the right to a speedy trial by the State and crime victims.

The *amicus curiae,* then, is caught in an untenable dilemma. To prevent further harm to these particular victims, the State must moot the present case with rapidity. To prevent future harm to other victims, the State must present this Court with a viable "case and controversy." Unless this Court invokes the "capable of repetition but evading review" doctrine, justice will not be served by either course of action.

The controversy between these parties is capable of repetition in several senses. First, since the Texas Court of Criminal Appeals held that "the real party at interest in the instant cause is Representative Danburg," it may be assumed that when the next regular Texas Legislature convenes in January, 1989, she will once more be filing motions for a continuance in the appellant's court. Second, based upon both the content and tenor of Judge Poe's Conclusions of Law (Jurisdictional Statement at 37a), it may be assumed that when State Representative Danburg files such a continuance, Judge Poe will once more deny it should he find "irreparable harm" to the crime victims. The *amicus curiae* submits that the dispute

between Judge Poe and Representative Danburg is thus capable of repetition at least every two years in a multitude of criminal cases.

Not only is this particular controversy, between these two individuals, likely to recur with regularity, but precisely the same scenario is capable of repetition between any criminal district or county judge in Texas, of whom there are several hundred, and any Texas senator or representative, of whom there are 181. The inevitability of such future confrontations is sufficient to overcome any supposed mootness raised by the fact that the Honorable Ted Poe is no longer immediately threatened by a writ of mandamus. *See Globe Newspaper Co. v. Superior Court for Norfolk,* 457 U.S. 596, 603 (1982); *Nebraska Press Ass'n. v. Stuart,* 427 U.S. 539, 546-547 (1976).

Texas legislative sessions are typically of short duration, with the regular session running from January to June in odd-numbered years. *See* Tex. Const. Art. III, section 5 (Vernon 1984); Tex. Gov't. Code, section 301.001 (Vernon 1986). Thus, any legislative continuance motion or any mandamus action against Judge Poe for denial of such a motion would expire of its own terms at the end of the legislative session. Any such mandamus order, then, would always evade review because legislative sessions are so short. *Press-Enterprise Co. v. Superior Court of California,* 106 S. Ct. 2735, 2739 (1986); *Globe Newspaper Co., supra,* at 603; *Nebraska Press Ass'n., supra,* at 546-547. *See also Roe v. Wade,* 410 U.S. 113, 125 (1973) (noting that nine month gestation period is so short that the pregnancy will be complete before the appellate process is).

Since legislative sessions are short and the judicial process long, the issue of whether mandatory legislative continuances deny the State and crime victims due process will forever escape review by this Court unless the "capable of repetition yet evading review" doctrine is invoked. *See Press-Enterprise Co., supra,* at 2739.

Recurrent injustice does not become less so merely because it is of relatively short duration. The "irreparable harm" suffered by the particular victims in this case, Jimmy Dale Collier and her daughter Doyelle Maines, cannot be rectified. Nonetheless, this Court should address the underlying issue of whether they or the State have any due process rights to assert in counterpoint to the statutory right of Representative Danburg to a continuance. While mistakes of the past cannot be corrected, those of the future may be prevented.

For this Court to deny review of the constitutional issues presented in *Collier v. Poe* on the basis of mootness would constitute the ultimate Catch-22. The Texas Court of Criminal Appeals held that the State and crime victims have no right to due process in a criminal trial and thus are not entitled to a trial court hearing on any "irreparable harm" caused by a legislative continuance. Should this Court refuse a hearing to review that holding, then the vicious circle would be complete. Not only would the State and crime victims be estopped from showing "irreparable harm" in the trial court, they would be estopped from ever getting this Court to review that denial. That would be true injustice.

Respectfully submitted,

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